IN THE HIGH COURT OF DELHI

C.R.P.No.134/2005

The Punjab State Electricity Board ..... Petitioner
! through: Mr. D.C.Khanna, Advocate

VERSUS

$ M/s. Vee Kay General Industries ..... Respondent
^ through: Mr. P.K.Aggarwal, Advocate with Mr. Noor Alam, Advocate

RESERVED ON: 11.07.2007

% DATE OF DECISION: 06.08.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. On 11.7.2007, arguments were concluded in the above captioned petition. Learned counsel for the petitioner had desired to file brief synopsis with decisions. Two weeks' time was granted to learned counsel for doing the needful.

2. Neither synopsis nor relied upon judgments have been filed.

3. Two weeks have elapsed.

4. A short issue arises for consideration in the instant petition.

5. Whether, vide order dated 8.10.2004 the rejection of

the application filed by the petitioner under Order 7 Rule 11 of the Code of Civil Procedure is as per law.

6. Respondent and the petitioner had entered into a jural relationship with each other when respondent's offer for supply of goods in respect whereof a notice inviting tender was issued by the petitioner was accepted by the petitioner.

7. Terms of the agreement between the parties find mention in a purchase order dated 21.6.1985.

8. Inter alia, vide Clause 15 of the Purchase Order, it was stipulated that dispute and differences between the parties pertaining to the contract would be got adjudicated through the medium of arbitration. The relevant part of the clause reads as under:-

> "15. Arbitration:-
> (i) If at any time any question, dispute or difference whatsoever shall arise between the Board and the supplier upon or in relation to or in connection with the contract either party may forthwith gift to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred for the Sole Arbitration of a nominee of the Punjab State Electricity Board. The award of the sole arbitrator shall be final and binding on the parties under the provisions of the Indian Arbitration Act, 1940 and of the rules thereunder. Any statutory amendment modification or re-enactment thereof for the time being in force shall be deemed to apply to and be incorporated in this contract/purchase order. It will not be objectionable if the Sole Arbitrator is an officer of the Board and he has expressed views on all or any of the matters in question of dispute or difference." (underlining emphasized)

9. Under the contract the goods could be supplied in stages. It was a term of the contract that for due purpose of the obligation to supply the goods, the respondent would furnish a

bank guarantee being 5% of the value of the supply.

10. The bank guarantee was furnished. Supply commenced. Part supply was effected. A dispute arose between the parties.

11. Eschewing the facts as to what happened after dispute arose, suffice would it be to note that on 6.10.1986 the petitioner returned the bank guarantee to the respondent. According to the respondent, the said bank guarantee was returned due to the reason that on 29.9.1986, at a meeting held between the representatives of the petitioner and the respondent it was mutually agreed that further supply be not effected and parties would stand released from their mutual obligations under the contract.

12. In the year 2004 a suit came to be filed by the respondent seeking a relief of declaration and permanent injunction.

13. The cause pleaded in the suit was a threat by the petitioner to effect recoveries from the respondent on account of stated risk purchase made by the respondent for the un-executed quantity of the supply to be effected under the contract between the parties.

14. Whereas respondent pleaded in the plaint that by virtue of the agreement dated 29.9.86 parties had mutually rescinded the contract and this was followed by the petitioner returning to it the bank guarantee furnished. Thus, it was stated

that the respondent was entitled to a declaration that there was no subsisting contract between the parties and further that it was entitled to a decree of permanent injunction prohibiting the petitioner from effecting any recovery pursuant to the alleged risk purchase made.

15. The respondent admitted that a meeting was held on 29.9.86. It also admitted having returned the bank guarantee which was received by it. But, it stated that the contract between the parties was not rescinded.

16. In the application under Order 7 Rule 11 of the Code of Civil Procedure, it was stated that due to the arbitration clause in the contract between the parties, suit was not maintainable. It was further pleaded that since Clause 14 of the agreement envisaged the jurisdiction of local courts at Patiala, courts at Delhi did not have territorial jurisdiction to entertain the plaint.

17. Learned Trial Judge has held against the petitioner on both counts.

18. Whereas learned counsel for the petitioner urged that the arbitration clause is very widely worded and all disputes in relation to or connection with the contract require to be settled through arbitration the suit was not maintainable. Additionally, placing reliance upon the Clause 14 of the contract it was urged that courts at Delhi would have no jurisdiction to entertain any claim pertaining to the contract.

19. At the outset it may be recorded that there is no

prohibition for a party to file a civil suit notwithstanding there being an arbitration clause in an agreement. But, where a suit is filed pertaining to a contract which requires dispute raised in the suit to be decided through the process and arbitration, it would be open to the defendant to inform the court about the arbitrable nature of the dispute and seek appropriate orders.

20. Under the Arbitration Act, 1940 remedy was to file an application under Section 34 and seek a stay of the suit. Under the Arbitration and Conciliation Act 1996 the remedy is to file an application under Section 8 of the said Act calling upon the Court to refer the parties to the forum of arbitration.

21. It is all together one thing to say that the dispute as raised in the plaint, being arbitrable, should be stayed (position under the Old Act) or referred to arbitration (position under the New Act) viz-a-viz to state that the suit is not maintainable.

22. Thus, on this short count alone, application under Order 7 Rule 11 CPC filed by the petitioner in so far it sought rejection of the plaint predicated on the plea that the dispute was arbitrable has to be dismissed.

23. Even on merits, no doubt, as held by the Supreme Court in the decision reported as AIR 1969 SC 488 *UOI Vs. Salwaan Timber & Construction Company*, an arbitration clause using the expression “arising out of the contract” or “in connection with the contract” is wide enough to encompass all disputes adjudication whereof would require the parties to refer to

or rely upon terms of the contract between the parties.

24. But, as observed by the Supreme Court in the report published as AIR 1953 SC 182 *Gaya Electric Supply Company Vs. State of Bihar*, notwithstanding the extended span of the sweep of the arbitration agreement, where a party seeks to avoid the contract for reason de-hors the contract, arbitration clause cannot be resorted to as the arbitration clause perishes along with the other terms of the contract if it is shown that de hors the contract a party is intending to avoid the same.

25. Thus, pleadings in the plaint assume significance.

26. In the instant case, foundation of the suit is the stated agreement dated 29.9.86. According to the averments made in the plaint on said date a meeting was held between the representatives of parties where it was mutually agreed to close the contract i.e. discharge both parties from the obligation to perform the contract. That pursuant to the said agreement the bank guarantee was returned by the petitioner. That there was no subsisting contract between the parties. Therefore, petitioner could not enforce right under the contract to recover any money on account of risk purchase effected for the un-executed quantities of supply.

27. The dispute raised in the plaint does not require either party to rely upon the terms of the contract. The subject matter of dispute between the parties is whether the original contract dated 21.6.1985 was superseded by an agreement dated 29.9.86

and pursuant to said agreement whether or not parties discharged each other from their reciprocal obligations under the contract.

28. Such a dispute cannot form the subject matter of an arbitration agreement.

29. On the issue of territorial jurisdiction, suffice it be to note that the restriction of territorial jurisdiction would be relevant if dispute was under the original contract or pertaining to the original contract.

30. As noted above, the dispute relates to the issue as to what was agreed between the parties on 29.9.86 i.e. whether on said date, by and under a mutual agreement, parties rescinded the original contract. Adjudication of this dispute being unrelated to the original contract, issue of territorial jurisdiction cannot be decided with reference to terms of the original contract.

31. I find no merits in the petition.

32. Dismissed.

33. No costs.

August 06, 2007
mm

(PRADEEP NANDRAJOG)
JUDGE